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Chapter VI
Protection of the atmosphere

A. Introduction

1. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the atmosphere" in its programme of work, subject to an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.[1]

2. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014); the second report at its sixty-seventh session (2015); the third report at its sixty-eighth session (2016); and the fourth report at its sixty-ninth session (2017).[2] On the basis of the draft guidelines proposed by the Special Rapporteur in the second, third, and fourth reports, the Commission provisionally adopted nine draft guidelines and eight preambular paragraphs, together with commentaries thereto.[3]

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/711), in which the Special Rapporteur, first, addressed the question of implementation of the draft guidelines at the national level. In that regard, he underlined the various modes of such implementation depending on the nature of the obligations concerned, and considered extraterritorial application of national law. Second, he examined the situations in which there was a failure to implement the obligations concerned. Turning to the question of compliance at the international level, the Special Rapporteur explained that he favoured cooperative compliance mechanisms, meant to give assistance to a non-compliant party, over punitive or enforcement mechanisms, which were based on the responsibility of States and intended to place penalties on the non-compliant party. Third, the Special Rapporteur considered the question of dispute settlement. In that connection, he emphasized both the need for the peaceful settlement of disputes and the need to take into account the scientific-heavy and fact-intensive character of environmental disputes, which led to a requirement to assess scientific evidence and ensure that adequate rules of procedure applied to such disputes.

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[1] At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10)), para. 168. The Commission included the topic in its programme of work on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding." The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365).

[2] A/CN.4/667, A/CN.4/681 and Corr.1 (Chinese only), A/CN.4/692, and A/CN.4/705 and Corr.1, respectively.

[3] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), paras. 53–54; and *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 95–96, and *Seventy-second Session, Supplement No. 10* (A/72/10), paras. 66–67.

4. Based on his analysis, the Special Rapporteur proposed three additional draft guidelines concerning implementation (draft guideline 10), compliance (draft guideline 11) and dispute settlement (draft guideline 12). Furthermore, the Special Rapporteur expressed the hope to conclude the first reading of the draft guidelines at the current session.

5. The Commission considered the fifth report of the Special Rapporteur at its 3405th and 3409th to 3413th meetings, on 17, 22, 23, 24, 25 and 29 May 2018, respectively.

6. Following its debate on the report, the Commission, at its 3413th meeting, on 29 May 2018, decided to refer draft guidelines 10 to 12, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

7. At its … meeting, on … 2018, the Commission received and considered the report of the Drafting Committee, and provisionally adopted the draft guidelines on the protection of the atmosphere on first reading (see section C.1, below).

8. At its … to … meetings, on … 2018, the Commission adopted the commentaries to the draft guidelines (see section C.2, below).